Chua Ek Leng (t/a sole proprietor under the style and firm name of Tenaga Tiasa Enterprise Co) v Tokio Marine Insurans (M) Bhd

HIGH COURT (KUCHING) — SUIT NO S-22–72 OF 2008-III
RAVINTHRAN JC
22 MARCH 2010

Evidence — Hearsay — Oral hearsay — Whether plaintiff's evidence about circumstances of alleged theft of excavators hearsay — Whether plaintiff had personal knowledge

Insurance — Policy of insurance — Claim under — Plaintiff insured excavators against risk of theft — Excavators seized by Indonesian soldiers for ransom — Whether plaintiff had proven on balance of probabilities that excavators were forcibly seized while being used in Sarawak — Whether taking of excavators by force constituted theft — Whether exceptions to policy applied

The plaintiff owned two Hydraulic excavators ('the excavators'), which were insured in the sum of RM680,000 with the defendant. The plaintiff's excavators were used for timber extraction in a timber concession area, which was near the international border between Malaysia and Indonesia. The plaintiff alleged that on 16 June 2007, 17 Indonesian soldiers encroached into the concession area and forced the plaintiff's workers to drive the excavators at gunpoint across the border into Indonesia. Thereafter the plaintiff allegedly received a phone call on his handphone from the soldiers, who had seized the excavators, demanding a ransom of RM100,000 for the return of the excavators. Although the plaintiff managed to reduce the ransom sum to RM80,000, negotiations between the plaintiff and the soldiers broke down and the plaintiff did not pay the ransom demanded. The plaintiff proceeded to lodge a police report about the loss of the excavators. The plaintiff's efforts to recover the excavators though the assistance of the Malaysian army at the border post and through the Indonesian consulate in Kuching also proved unsuccessful. The plaintiff then made an insurance claim against the defendant based on the insured risk of theft but the defendant refused to indemnify the loss of the plaintiff's excavators and hence this suit. The plaintiff pleaded that the excavators were seized from Malaysian territory and driven to Indonesia and that the defendant was liable to pay for the plaintiff's losses under the policy. The defendant's case was that even if the excavators were seized from Malaysian territory at gun point and driven across the border, the loss was not caused by theft within the meaning of criminal law and within the meaning of

the policy. Instead the defendant argued that the loss of the excavators in the instant case was caused by extortion or robbery which was not an insured peril. The defendant further submitted that the plaintiff's policy was repudiated under two exclusionary clauses, ie that of 'usurped power' and seizure by 'government authorities'. The defendant also put the plaintiff to strict proof as to whether the excavators were used within Sarawak when they were seized by the Indonesian soldiers.

Held, dismissing the plaintiff's claim with costs:

(1) The crucial fact that the plaintiff had to prove on a balance of probabilities was that the insured peril, ie the theft of the excavators, occurred while the excavators were being used in Sarawak, as the policy clearly provided for coverage for the excavators only within Sarawak. In the present case the plaintiff's evidence about the circumstances of the alleged theft of the excavators was complete hearsay because the plaintiff was not at the scene and had no personal knowledge that the excavators were taken from the Malaysian side of the border to Indonesian territory. The only fact that the plaintiff could directly verify was the alleged demand for the ransom of RM100,000, which would only establish that the excavators were in the hands of a third party and that a demand for ransom was made without establishing that the excavators were taken by force while being used in Sarawak. The police and insurance investigations did not probe into its truth as well. There was no direct or circumstantial evidence that the excavators were stolen or that the excavators were driven at gun point from Malaysia into Indonesia by an armed band of Indonesian soldiers. As such, the plaintiff had failed to prove its case on a balance of probabilities (see paras 9, 10 & 17).

(2) Regardless of whether there was robbery by theft or by extortion, the insurance policy had not excluded the peril of robbery. Therefore the alleged act of the armed Indonesian soldiers if proven, was within the ambit of the insured peril of theft (see paras 14–15).

(3) Even if the plaintiff succeeded in proving theft, no claim would attach because of exclusion cl 9(b) and (d) of the policy. The defendant bore the burden of proving that the case fell within the exclusion clauses. The objective of cl 9(b) was to exclude coverage in extraordinary situations such as in the present case where if the plaintiff was right that 17 armed Indonesian soldiers encroached into Malaysian soil to commandeer the excavators. Under these circumstances the seizure of the excavators could not be considered ordinary theft but an extraordinary situation which the ordinary police could not have dealt with. Further, cl 9 (d) would also apply if the excavators were seized by 'government authorities' such as the Indonesian soldiers in the present case (see paras 17 & 25–26).

(4) In the event that the plaintiff had proved his claim, there was a breach of condition 5 of the policy in that the plaintiff failed to obtain the defendant's consent before negotiating with the Indonesian soldiers about the ransom (see para 39).

[Bahasa Malaysia summary

Plaintif memiliki dua mesin pengorek Hydraulic ('mesin-mesin pengorek tersebut'), yang diinsuranskan dalam jumlah RM680,000 dengan defendan. Mesin pengorek plaintif digunakan untuk mencabut kayu balak di bahagian konsesi kayu balak, yang mana terletak hampir di sempadan antarabangsa di antara Malaysia dan Indonesia. Plaintif mendakwa bahawa pada 16 Jun 2007, 17 askar Indonesia mencerobohi bahagian konsesi tersebut dan memaksa pekerja-pekerja plaintif untuk memandu mesin-mesin pengorek tersebut dengan diacukan pistol melintasi sempadan masuk ke Indonesia. Kemudiannya plaintif mendakwa menerima panggilan di telefon bimbitnya daripada askar-askar yang merampas mesin-mesin pengorek tersebut, menuntut wang tebusan sebanyak RM100,000 untuk mengembalikan mesin-mesin pengorek tersebut. Walaupun plaintif berjaya mengurangkan jumlah wang tebusan kepada RM80,000, perundingan di antara plaintif dan askar-askar gagal dan plaintif tidak membayar wang tebusan yang dituntut. Plaintif meneruskan membuat laporan polis mengenai kehilangan mesin-mesin pengorek tersebut. Usaha plaintif untuk mendapatkan kembali mesin-mesin pengorek tersebut melalui bantuan tentera Malaysia di pos sempadan dan melalui konsulat Indonesia di Kuching juga dibuktikan tidak berjaya. Plaintif kemudiannya membuat tuntutan insurans terhadap defendan berdasarkan risiko kecurian yang diinsuranskan tetapi defendan menolak untuk membayar ganti rugi kehilangan mesin-mesin pengorek plaintif tersebut dan maka tindakan ini. Plaintif memplid bahawa mesin-mesin pengorek tersebut dirampas daripada kawasan Malaysia dan dipandu masuk ke Indonesia dan bahawa defendan bertanggungjawab untuk membayar kerugian plaintif di bawah polisi tersebut. Kes defendan adalah bahawa walaupun mesin-mesin pengorek tersebut dirampas daripada kawasan Malaysia dengan diacukan pistol dan dipandu melintasi sempadan, kerugian bukan disebabkan oleh kecurian dalam maksud undang-undang jenayah dan dalam maksud polisi tersebut. Sebaliknya defendan menegaskan bahawa kehilangan mesin-mesin pengorek tersebut di dalam kes ini disebabkan oleh pemerasan atau rompakan yang bukan bahaya yang diinsuranskan. Defendan selanjutnya berhujah bahawa polisi plaintif ditamatkan di bawah dua klausa pengeculian iaitu 'usurped power' dan perampasan oleh 'government authorities'. Defendan juga meminta plaintif membuktikan sama ada mesin-mesin pengorek tersebut diguna di Sarawak apabila ia dirampas oleh askar-askar Indonesia.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Fakta penting yang plaintif dikehendaki untuk membuktikan di atas

imbangan kebarangkalian adalah bahawa bahaya yang diinsuranskan iaitu kecurian mesin-mesin pengorek tersebut, berlaku semasa mesin-mesin pengorek tersebut digunakan di Sarawak, kerana polisi jelas memperuntukkan perlindungan untuk mesin-mesin pengorek tersebut hanya dalam negeri Sarawak. Dalam kes ini keterangan plaintif mengenai keadaan kecurian mesin-mesin pengorek yang didakwa tersebut adalah betul-betul dengar cakap kerana plaintif tidak berada di tempat kejadian dan tidak mempunyai pengetahuan peribadi bahawa mesin-mesin pengorek tersebut diambil daripada kawasan sempadan sebelah Malaysia daripada kawasan Indonesia. Satu-satunya fakta yang boleh disahkan secara terus oleh plaintif adalah tuntutan wang tebusan yang didakwa sebanyak RM100,000, yang satu-satunya boleh membuktikan bahawa mesin-mesin pengorek tersebut berada di dalam tangan pihak ketiga dan bahawa tuntutan untuk wang tebusan dibuat tanpa membuktikan bahawa mesin-mesin pengorek tersebut diambil secara paksa semasa digunakan di Sarawak. Polis dan penyiasat-penyiasat insurans juga tidak memeriksa dengan teliti kebenarannya. Tidak terdapat keterangan terus atau keadaan bahawa mesin-mesin pengorek tersebut dicuri atau mesin-mesin pengorek tersebut dipandu dengan diacukan pistol kepadanya dari Malaysia masuk ke Indonesia oleh pasukan bersenjata askar-askar Indonesia. Oleh itu, plaintif telah gagal untuk membuktikan kesnya atas imbangan kebarangkalian (lihat perenggan 9, 10 & 17).

(2) Tidak kira sama ada terdapat rompakan melalui kecurian atau pemerasan, polisi insurans tidak mengecualikan bahaya rompakan. Oleh itu tindakan askar-askar Indonesia yang bersenjata yang didakwa jika dibuktikan, dalam lingkungan bahaya kecurian yang diinsuranskan (lihat perenggan 14–15).

(3) Walaupun plaintif berjaya membuktikan kecurian, tiada tuntutan boleh dikaitkan kerana klausa-klausa pengecualian 9(b) dan (d) polisi. Defendan menanggung beban untuk membuktikan bahawa kes terangkum dalam klausa-klausa pengecualian. Objektif 9(b) adalah untuk mengecualikan perlindungan di dalam keadaan-keadaan luar biasa seperti kes ini di mana jika plaintif adalah betul 17 askar-askar Indonesia yang bersenjata mencerobohi masuk ke tanah Malaysia untuk merampas mesin-mesin pengorek tersebut. Di bawah keadaan-keadaan ini perampasan mesin-mesin pengorek tersebut tidak boleh dipertimbangkan kecurian biasa tetapi keadaan luar biasa di mana polis biasa tidak dapat menguruskannya. Selanjutnya klausa 9(d) juga beraplikasi jika mesin-mesin pengorek tersebut dirampas oleh 'government authorities' seperti askar-askar Indonesia di dalam kes ini (lihat perenggan 17 & 25–26).

A (4) Walaupun plaintif berjaya membuktikan tuntutannya, terdapat kemungkiran syarat 5 polisi di mana plaintif gagal untuk memperolehi izin defendan sebelum berunding dengan askar-askar Indonesia mengenai wang tebusan (lihat perenggan 39).]

B **Notes**

For a case on oral hearsay, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1764.

For cases on insurance generally, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1–385.

C **Cases referred to**

American Home Assurance Co v Nalin Industries Sdn Bhd [1993] 2 MLJ 409, SC (refd)

Commercial Union Assurance (M) Sdn Bhd v Pilihan Megah Sdn Bhd [1998] 7 MLJ 33, HC (refd)

D *Drinkwater v Corp of London Assurance* (1767) 2 Wils 363 (refd)

Langdale v Mason (1780) 2 Park on Insurance 965 (refd)

London and Manchester Plate Glass Company, Limited v Heath [1913] 3 KB 411, CA (refd)

E *Malaysian Tobacco Co Bhd v The Roadrailer Service Bhd* [1995] 1 MLJ 847, HC (refd)

Motor Union Insurance Co, Ltd v Boggan [1923] All ER Rep 331, HL (refd)

Norashikin v Champion Motors (M) Sdn Bhd [1971] 2 MLJ 217 (refd)

Rogers v Whittaker [1917] 1 KB 942, KBD (refd)

F *Thag Services Inc (M) Sdn Bhd v Capital Insurance Bhd* [1989] 2 CLJ 504, HC (refd)

White, Child and Beney Ltd v Simmons; Same v Eagle Star and British Dominions Insurance Co [1922] All ER Rep 482, CA (refd)

G *Wong Kon Poh v New India Assurance Co Ltd* [1970] 2 MLJ 287, FC (refd)

Legislation referred to

Penal Code s 378

Danny Chan Cheng San (Chan & Chan Advocates) for the plaintiff.

H *Bong Siak Peng (Reddi & Co Advocates) for the defendant.*

Ravinthran JC:

I **[1]** This is an insurance claim by the plaintiff against the defendant. The plaintiff had insured two excavators in the sum of RM680,000 with the defendant. The excavators were allegedly brought across the Malaysia border into Indonesia by the criminal act of unknown persons alleged to be Indonesian (TNI) soldiers. The defendant has refused to indemnify the loss of

the plaintiff's excavators and hence this suit.

SUMMARY OF THE PLAINTIFF'S EVIDENCE

[2] The parties tendered a brief statement of agreed facts at the outset of the trial. The plaintiff was the only witness on his own behalf. He is a sole proprietor trading under the style and firm name of Tenaga Tiasa Enterprise Co with an office premise in Sibu. The defendant is an insurance company based in Kuala Lumpur. The plaintiff owned two Hitachi brand Caterpillar excavators. These two excavators were used in logging activities. The plaintiff was a contractor of Unison Lumber Sdn Bhd who was involved in timber extraction in a concession area at Kampung Selopong in the Sri Aman Division. This area is near the international border between Malaysia and Indonesia. The plaintiff deployed a total of three excavators in the concession area; one was stationed at the base camp while the other two which are the subject matter of this suit were used to extract timber. The two excavators were manned by the plaintiff's operators by the name of Wira bin Maliki and Yap bin Uyat. The plaintiff's case is that on 16 June 2007, 17 persons believed to be Indonesian soldiers had encroached into the concession area which is on Malaysian territory and forced the operators to drive the excavators into Indonesian territory at Kalimantan Barat where they were guarded at the army camp. The plaintiff was not present at the site when the excavators were seized. However, he received a phone call from one of the soldiers who demanded a ransom of RM100,000 for the return of the excavators. The next day, his two workers managed to escape from the Indonesian soldiers and returned to the Malaysian side of the border. However, on 18 June 2007, the soldiers called the plaintiff again to demand RM100,000. The plaintiff managed to reduce the amount to RM80,000. On 19 June 2007, the plaintiff sent two Indonesian workers with some rations to the Indonesian site. However, the two workers did not know how to drive the excavators. The Indonesian soldiers then requested the plaintiff to send the money with two workers who could drive the excavators. The negotiations stalled at this point and the plaintiff sought the assistance of the Malaysia Army at the border post to retrieve the excavators. He was unsuccessful and he reported the loss of the excavators to the Sri Aman Police on 21 June 2007. He also wrote to the Indonesian Consulate in Kuching for assistance but to no avail. However, he did not attempt to recover the excavators through the Indonesian legal system. During cross-examination he disagreed that his workers who operated the excavators encroached into Indonesian territory. He agreed that the police report was lodged on his behalf by one Chua Yii Chung who was his camp manager. He disagreed that he did not give immediate notice to the insurer and that he did not deliver a detailed claim within 15 days after the loss of the excavators. He also disagreed he did not take reasonable steps to safeguard the excavators from loss.

SUMMARY OF THE DEFENDANT'S EVIDENCE

[3] The defendant called three witnesses; a police officer ('DW1') who acted on the plaintiff's report, an insurance adjustor ('DW2') and the assistant general manager ('DW3') of the defendant. DW1 told the court that based on the police report the two excavators were forcibly driven to the Indonesian side of the border at gunpoint. He said the case was classified as 'seizure of vehicle by the TNI (Indonesian Army)'. He said he did not open an investigation paper on the case because the report stated that the equipment was seized by the Indonesian Army. He added that if the complainant had stated in the report that it was a robbery, he would have investigated the matter under the Penal Code. DW2 is a loss adjustor from Maphlindo International. He did not visit the site. He found that the incident took place about 1km from the buffer zone of the Malaysian-Indonesia border. He qualified his finding by saying that his investigation was entirely based on the police report and interviews with the camp manager and Wira bin Maliki, one of the operators of the excavators. However, in his conclusion he said that the TNI soldiers accused the two operators of encroaching into their territory. The last witness for the defendant was their assistant general manager. He said that the plaintiff did not state in the proposal form that the excavators would be used near the Malaysian-Indonesian border. He said the plaintiff submitted a written claim after 15 days. But during cross-examination he agreed that the claim notification submitted by its agent, Leading Protection Enterprise Sdn Bhd was effective notification. DW3 said that his company's reason for not indemnifying the plaintiff for his loss was because the claim fell within cl 9(b) and (d) of the exceptions.

AGREED FACTS

[4] At the outset of the trial the parties agreed on the following facts:

(a) The Plaintiff is a sole-proprietor trading under the style and firm name of Tenaga Tiasa Enterprise Company (BNR No. 860/00) with an office premises at No. 20 (1st Floor), Lorong Selemo 2, Off Jalan Deshon, 96000 Sibu.

(b) The Defendant is an insurance company with its registered address at 10th Floor, Wisma Havela Thakardas, No. 1 Jalan Tiong Nam, Off Jalan Raja Laut, Kuala Lumpur, 50250 Wilayah Persekutuan and its business address at 29th–31st Floor, Menara Dion, 27, Jalan Sultan Ismail, Kuala Lumpur, 50250 Wilayah Persekutuan.

(c) The Plaintiff is and was at all material times the owner of two (2) units new Caterpillar 320D Hydraulic excavators complete with standard accessories bearing Serial No. CAT0320DHJGZ00467 and CAT0320DEJGZ00468, and Engine Nos. MAE 12919 and MAE 13047 respectively.

(d) The Plaintiff's two (2) excavators were insured by the Defendant under and by virtue of a Policy Insurance No. U-G-A7-AG-000149 effective from 23.01.2007 to 22.01.2008 (both dates inclusive).

(e) The Plaintiff has lodged a police report at Sri Aman Police Station on 21.06.2007.

(f) The Plaintiff has written to the Consulate General of Indonesia in Kuching on 04.07.2007 to seek assistance for the return of the Plaintiff's two (2) excavators.

(g) The Plaintiff has made a claim to the Defendant for loss of the Plaintiff's two (2) excavators but the Plaintiff's claim was rejected by the Defendant on 11.10.2007.

(h) The Plaintiff has appealed to the Financial Mediation Bureau as advised by the Defendant but was informed by the Financial Mediation Bureau that their jurisdictional limit is only RM100,000.00 much less than the Plaintiff's claim.

(i) On 28.03.2008, the Plaintiff, through its solicitors, wrote to the Defendant to demand for the insured sum of RM680,00.00 pursuant to the Insurance Policy No. U-G-A7-000149 but the Defendant has, by its letter dated 28.03.2008 repudiated the Plaintiff's claim pursuant to the exclusion clauses 9(b) and (d) of the said Insurance Policy.

[5] It must be noted that although the policy was repudiated under two exclusionary clauses only, ie that of 'usurped power' and seizure by 'government authorities', the defendant had not agreed in the agreed statement of facts that excavators were used within Sarawak when they were seized.

AGREED ISSUES

[6] The parties had identified the following issues at the outset of trial.

(a) Whether on or about 16.06.2007 at about 10.30 a.m., the Plaintiff's two excavators were being utilized by the Plaintiff's employees at a forest concession under the timber license no. T/8379 of Unison Lumber at Selepong, Sri Aman?

(b) Whether the Plaintiff's two (2) employees, one Wira Bin Maliki (WN. KP. 830826–13–5909) and one (1) Yap Bin Uyat were the designated drivers of the Plaintiff's two (2) excavators and were carrying out their duties at the worksite which is located approximately one (1) kilometer from the buffer zone of the Malaysian/Indonesian border?

(c) Whether at or about 12.00 p.m. on 16.06.2007, the Plaintiff's two (2) employees were accosted by a group of approximately 17 or 18 persons who claimed to be Indonesian Soldiers, who then proceeded to force the Plaintiff's two (2) employees to drive the Plaintiff's two (2) excavators into Indonesian territory?

(d) Whether the Plaintiff's two (2) excavators were duly driven by the Plaintiff's two (2) employees at gunpoint and under protest across the Indonesian border?

(e) Whether the Defendant is liable to pay for the Plaintiff's losses under the Policy?

(f) (i) Whether the Defendant is liable for loss or damage caused by seizure, confiscation or detention by Government Authorities under the Equipment Insurance Policy and Equipment Insurance Schedule? Schedule?

(ii) Whether the Defendant is liable for loss or damage caused by military or usurped power under the Equipment Insurance Policy and Equipment Insurance?

(g) If the Plaintiff's loss or claim is found to be within the ambit of the policy, whether the Defendant is in breach of any policy conditions 3, 4, 5, and 13 under the Equipment Insurance Policy and Equipment Insurance Schedule?

WHETHER THE EXCAVATORS WERE FORCIBLY SEIZED FROM SARAWAK

[7] Issues (a)–(d) can be grouped together as they are related. They call into question the case of the plaintiff that the tractors were seized at gun point from the Malaysian side of the border and stolen. The insurance policy in question provided indemnity against loss or damage caused by:

(a) accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear;

(b) fire external explosion self-ignition or lightning;

(c) burglary housebreaking or theft.

[8] In the statement of claim, the plaintiff pleaded that the excavators were seized from Malaysian territory and driven to Indonesia. In the notice of claim submitted to the defendant, the claim of the plaintiff is based on the insured risk of theft. Regardless of the exceptions that the defendant are relying on to repudiate the policy, the burden of proof is on the plaintiff to bring the claim within the ambit of the policy (see *American Home Assurance Co v Nalin Industries Sdn Bhd* [1993] 2 MLJ 409). The Supreme Court in that case stated as follows in respect of the burden on the plaintiff to bring the insurance claim within the ambit of the policy:

> It is of course incumbent on the respondent as the plaintiff to establish that the loss it suffered arose out of an accident to an object covered by the policy. In *Regina Fur Co Ltd v Bossom*, Evershed MR held that the onus of proving that its case fell within the policy, remained at all times with the insured.

[9] If the plaintiff succeeds in bringing the claim within the ambit of the policy, the defendant has to discharge the burden to prove that the policy fell within the exceptions to the policy or that the conditions of the policy had been breached.

[10] The policy states that the coverage for the excavators is within Sarawak. In the statement of defence, the defendant put the plaintiff to strict proof that the excavators were used within Sarawak when it was seized. If the plaintiff cannot prove on a balance of probabilities that the excavators were used within Sarawak when the loss was suffered, the claim would not be within the ambit of the policy as the insured peril is against theft when used within Sarawak. Therefore, the first issue would be whether the excavators were within Sarawak when the loss occurred. The second issue would be whether the excavators were forcibly seized. The plaintiff's two workers were not called as witnesses. The two workers are Wira Bin Maliki and Yap bin Unyap. The plaintiff testified that Mr Wira had left his employ and is now working in the Solomon Islands. As for Mr Yap, he left the employ of the plaintiff soon after the incident and his whereabouts are unknown to the plaintiff. The defendant has raised the issue of adverse inference. In my opinion, adverse inference cannot be invoked as there is no question of suppression of evidence as the plaintiff had given valid reasons for his inability to produce the said witnesses. However, the plaintiff has to prove on a balance for probabilities that the vehicles were stolen while being used on the Malaysian side of the border. The plaintiff was far away from the scene when the alleged incident occurred. He testified that the timber concession area where his excavators were used for extraction was one kilometre from the Malaysian-Indonesian border buffer zone. He said that one of the excavators was used at the timber camp but the other two excavators were used to extract timber. At first, the plaintiff said that he lodged the police report himself. Later during cross-examination he corrected himself and told the court that his camp manager lodged the report. The police report lodged by the camp manager of the plaintiff stated that the two excavators were driven at gun point by TNI soldiers into Indonesian territory where the operators were forced to build a helipad.

[11] The police did not investigate the case as the report stated that the excavators were seized by TNI soldiers. They did not go beyond the police report. The insurance adjustor based his investigation on the police report that the excavators were seized by Indonesian soldiers. The plaintiff claimed that the timber camp was located only one kilometre away from Malaysian-Indonesia border buffer zone. His workers were operating the excavators near the border. They were allegedly forced by TNI soldiers to drive the excavators across the border to build a helipad. The vehicles were not returned because the plaintiff said that he did not pay the ransom demanded after the breakdown of negotiations. The crucial fact that must be proved before the plaintiff can claim under the policy is that the insured peril caused the loss of the excavators. The peril in question is theft, ie the excavators were stolen while being used in Sarawak. Counsel for defendant suggested to the plaintiff during cross-examination that his workers had encroached into Indonesian territory. The reason he made this suggestion is because Wira bin Maliki gave a statement after his escape to the loss adjustor that the TNI soldiers accused him and his

colleague of encroaching into Indonesian territory. The plaintiff who was the only witness on his behalf denied that his workers had encroached into Indonesian territory. He said the excavators were in Malaysian territory and were driven across the border at gun point. However, he admitted that he was not at the scene and had no personal knowledge that the excavators were taken to Indonesian territory. He only heard from his workers that they were forced to drive the excavators from the Malaysian side of the border into Indonesia. Therefore, his evidence about the circumstances of the alleged theft of the excavators is complete hearsay. The only fact that he could directly verify is the alleged demand for ransom of RM100,000. He said that one of his workers had given his hand phone number to the alleged TNI soldiers. One of the TNI soldiers called him and demanded RM100,000 and food rations. Even if I accept the plaintiff's evidence that he received such a call, it would only establish that the excavators were in the hands of a third party and that a demand for ransom was made. It would not prove that the excavators were taken from Sarawak and driven across the border at gun point. The insurance policy clearly provides for coverage within Sarawak. Therefore, there must be evidence that the excavators were taken by force while being used in Sarawak. As I said, the plaintiff was not at the scene and therefore he would have no knowledge whether his excavators could have been used across the border. The only witnesses who could give evidence that the armed intruders who looked like TNI soldiers had taken the excavators across the border by force would be the two workers. The plaintiff said that one of them could not be found as he had left his employ. The other worker, Mr Wira, had cooperated with the insurance investigation. His whereabouts are known to the plaintiff. He told the court that Mr Wira is currently working in the Solomon Islands. In fact an adjournment had been granted on 30 November 2009 to facilitate his attendance. However, the plaintiff failed to secure his presence in court and the case proceeded. Even the camp manager who lodged the first information police report was not called. He could have thrown some light as to the location of the excavators on the day in question. The police report of the camp manager was admitted into evidence. However, the defendant only agreed to the authenticity of the report. They did not agree as to the truthfulness of its content. The police and insurance investigations did not probe into its truth as well. The defendant put the plaintiff to strict proof that the excavators were stolen from Malaysian soil. Therefore it was incumbent upon the plaintiff to prove, by either direct or circumstantial evidence, that the excavators were stolen. The plaintiff completely failed to do that as he had no personal knowledge whether the excavators were taken by force from the Malaysian side of the border.

WHETHER THE TAKING OF THE EXCAVATORS BY FORCE CONSTITUTES 'THEFT'

[12] In the event I am wrong in finding that the plaintiff had failed to prove

on a balance of probabilities that the excavators were taken by force from Sarawak by armed intruders suspected to be TNI soldiers, I shall now consider the next crucial issue submitted by the parties: whether the taking of the excavators by armed intruders constitutes 'theft' within the meaning of the policy? The insurance policy in question provided indemnity against loss or damage caused by:

(a) accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear;

(b) fire external explosion self-ignition or lightning;

(c) burglary housebreaking or *theft*.

[13] The term 'theft' was not used in the statement of claim. However, based on the facts pleaded and the evidence which was led, the plaintiff argued the alleged seizure of the excavators by TNI soldiers amounted to theft. The defendant's case is that even if the excavators were seized from Malaysian territory at gun point and driven across the border, the loss was not caused by theft within the meaning of criminal law and within the meaning of the policy. Section 378 of the Penal Code defines theft as follows:

> Whoever intending to take dishonestly any movable properties out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit theft.

[14] Counsel for defendant argued that in the instant case the loss of the excavators if any, was caused by extortion or robbery which is not an insured peril. I agree with him that the general meaning of theft must be ascertained by reference to the criminal law. However, the interpretation of clauses in a commercial contract must yield to business common sense. In *Wong Kon Poh v New India Assurance Co Ltd* [1970] 2 MLJ 287, Ong CJ dismissed the argument that the plaintiff cannot recover simply because the insured property was lost through 'robbery' instead of 'theft'. Ong CJ said as follows:

> At all events, to deny the axiomatic truth of the proposition that 'robbery is an aggravated form of theft' and to dismiss the appeal on that ground is manifestly a denial of justice upon a technical defence which has absolutely no merits. A policy which insures against loss by 'burglary, housebreaking or theft', but says nothing of 'robbery', must on any reasonable construction be held to include 'robbery' within the coverage of 'theft'. Like burglary or housebreaking, robbery is merely a variation of the same theme. Otherwise its exception must clearly and expressly be made known to the party insured — not by implication to be inferred from the omission. To require that the ordinary man taking out a policy should read into it not only what was expressed, but also to construe omissions as exceptions, is an absurd proposition which this court cannot countenance.

[15] However, counsel for defendant argued that there is a difference between robbery in which there is theft and robbery in which there is extortion. He said in this case, the offence, if the allegation of the plaintiff is true, is robbery by extortion because a ransom was demanded. To my mind, regardless of whether there was robbery by theft or by extortion, the insurance policy had not excluded the peril of robbery. In the above cited case, Ong CJ also quoted his brother judge, Ali FJ who presided with him as having asked the following question:

> As Ali FJ pointed out, where a thief attempted to sneak off on the appellant's motorcycle and managed to do so, it was of course a case of theft, which was covered by the policy; but, if the thief, while interrupted in the act, drew a dagger and warned the appellant not to prevent his get away, how in the name of commonsense can it be argued that the taking, in the latter case, was not as much a risk insured against as the taking by stealth?

[16] Similarly in the case of *Malaysian Tobacco Co Bhd v The Roadrailer Service Bhd* [1995] 1 MLJ 847, it was held that the omission of the word 'robbery' did not provide an exception as 'theft' was an insured risk. I therefore hold that the alleged act of the armed intruders if proven, is within the ambit of the insured peril of theft.

WHETHER THE EXCEPTIONS TO THE POLICY APPLY

[17] Exceptions in cl 9(b) and (d) of the policy provide that the defendant shall not be liable for:

> loss of damage directly or indirectly proximately or remotely occasioned by contributed to by or traceable to or arising out of or in connection with any of the following occurrence, namely;
>
> (a) ...
>
> (b) mutiny, strike riot and civil commotion, military or popular rising, insurrection, rebellion, revolutionary, military or *usurped power*, martial law or state of siege or any of the event or causes which determine the proclamation or maintenance of martial law or state of siege
>
> (c) ...
>
> (d) delay, seizure, confiscation or detention by *Government Authorities*. (Emphasis supplied.)

[18] The defendant repudiated the policy after receiving the loss adjustor's report under these two exclusion clauses. The burden of proving that the case fell within the exception clauses lies with the defendant (see *Motor Union Insurance Co, Ltd v Boggan* [1923] All ER Rep 331). I had found that the plaintiff failed to prove on a balance of probabilities that the excavators were

taken by force from the Malaysian side of border into Indonesia by an armed band of intruders who are alleged to be TNI soldiers. I shall now consider whether the exception in cl 9(b) applies in the event I am wrong in my finding. Clause 9(b) is the usual exception clause found in insurance policies to protect against accident, fire, burglary and theft. Although this type of exclusion clause has a long history in the insurance industry, there are not many local cases that have interpreted this provision. In *Norashikin v Champion Motors (M) Sdn Bhd* [1971] 2 MLJ 217, there was no dispute that the motor vehicle in question was burnt during a riot and the case turned on waiver. I must now turn to some English cases for assistance. In *Rogers v Whittaker* [1917] 1 KB 942, the exclusion case read:

> ... no claim is to attach for a loss or damage resulting from insurrection, riots, civil commotion or military or usurped power.

[19] The plaintiff's warehouse was burnt by an incendiary firebomb that was dropped by a Zeppelin aircraft during the First World War. Sankey J was of the view that the clause has two limbs:

(1) insurrection, riots, civil commotion etc; and

(2) military or usurped power.

[20] He said that the first refers to domestic disturbances of different degrees of intensity, from insurrection down to the civil commotion. In respect of 'military or usurped power', he thought that they refer to something more than mere internal incidents or otherwise the first limb would be redundant. He concluded as follows:

> Without using words of rigorous accuracy, military and *usurped power* suggest something more in the nature of war and civil war than riot and tumult. To sum up, in my view this clause is not merely a riot clause from beginning to end, but it is a riot clause and a war clause combined. In the result the event is within the exception, is not one which is covered by the policy, and as a consequence the claim fails.

In *Motor Union Insurance Co, Ltd v Boggan* [1923] All ER Rep 331, the exception clause read:

> Loss or damage arising during (unless it be proved by the insured that the loss or damage was not occasioned thereby) or in consequence of earthquake, war, invasion, riot, civil commotion, military or usurped power.

[21] In the above case, a car that was insured against theft was taken by four armed men believed to be Irish revoluntaries. His Lordship of the House of Lords observed the loss of the car was not caused by ordinary theft. The car was 'commandeered' by armed men who were acting with some force behind them

which made them feel they were the masters of the situation. There was also evidence that the ordinary police were helpless to deal with the situation because police from the outlying stations were withdrawn for fear of being attacked. The case actually turned on the meaning 'civil commotion and riot'. However it is very instructive to refer to the speech of Lord Wrenbury at the House of Lords on the purpose of this clause:

> I am of opinion that the true meaning and scope of this policy is that where the arm of the ordinary law is paralysed by commotion, disturbance, or riot, the insurers are not liable to theft by armed men.
>
> I think that is well founded, and I think it is shown here that the ordinary law — these men knew that the law was incapable of interfering with them — was paralysed and there was a state of commotion, disturbance, or riot.

[22] In the English Court of Appeal case of *White, Child and Beney Ltd v Simmons; Same v Eagle Star and British Dominions Insurance Co* [1922] All ER Rep 482, the Court of Appeal had to determine whether the confiscation of monies in a bank in Russia by the new Soviet Government is an exception to the insurance policy. The Court of Appeal held that since the Soviet Government had been given de facto recognition by the foreign office, it constituted government of the day and that the relevant date is the date of the loss and not the date of the policy. This case is not relevant to the instant case as there was no discussion on the meaning of the exclusion clause. The case was decided on interpretation to be assigned to the 'government of the day' because of a clause that provided that:

> No claim to attach hereto … for confiscation or destruction by the government of the country in which the property is situated.

[23] Since the Soviet Government was accorded de facto recognition it was not considered a 'usurping power'.

[24] In *Drinkwater v Corp of London Assurance* (1767) 2 Wils 363, a malting office was burnt down by a mob. The issue was whether the actions of the mob amounted to a usurping power. The Justices in the above case opined that foreign invasion or armed rebellion would bring into operation the term 'usurping power'.

[25] The last case that I shall consider on this point is the case of *London and Manchester Plate Glass Company, Limited v Heath* [1913] 3 KB 411 where his Vaughan Williams LJ referred to the old case of *Langdale v Mason* (1780) 2 Park on Insurance 965 where Lord Mansfield said that:

> Though this be so guarded, the Sun Fire Office did not think it suited their purpose; and therefore they took the words civil commotion … I think a civil commotion is this; an insurrection of people for general purposes, though it may not amount to a rebellion, where there is an usurped power.

[26] I shall now consider whether the defendant can rely on the exception clause in question to argue that the claim does not attach. There is no suggestion by either party that there was any local disturbance in the area in question which is only one kilometre from the border. Therefore, the question that arises is whether, assuming that the plaintiff's case that the excavators had been seized by soldiers of TNI from Malaysian territory is true, the 'military or usurped power' limb of the exception clause applies. Counsel for the plaintiff argued that it does not apply because there was no foreign invasion. On the other hand, counsel for the defendant argued that the theft in question is not ordinary theft and is therefore excluded from coverage. Although I had ruled that the plaintiff had failed to prove on balance of probabilities that TNI soldiers had encroached into Malaysian territory to take possession of the tractors, I shall for sake of argument proceed on the assumption that they had done so. In my opinion, after having considered the abovecited cases, the object of cl 9(b) is to exclude coverage in extraordinary situations. As stated by Sankey J in *Rogers v Whittaker* the exclusion clause has two limbs; they concern internal threats (insurrection, riots, civil commotion etc) and external threats (military or usurped power). His Lordship considered the incendiary bomb that was dropped by a German airplane as coming within the limb of 'military or usurped power'. I should think that it is beyond argument that if the plaintiff is right about the 17 armed TNI soldiers encroaching into Malaysian soil to commandeer the excavators, an extraordinary situation had developed. There would have been a violation of the territorial sovereignty of the country. Under these circumstances, the seizure of the excavators cannot be considered ordinary theft. As observed in *Motor Union Insurance Co, Ltd v Boggan*, the ordinary police would have been powerless to deal with it. This is because the armed men would have acted *with some force behind them which made them feel they were the masters of the situation*. In fact in this case DW1, the senior police officer who made a decision on the police report of the camp manager said that he did not even open an investigation paper because of the allegation that the excavators were taken by the TNI soldiers. The plaintiff also testified that he sought assistance from the Malaysian Army border post but they could not do anything either. Therefore, the alleged facts if proven true would attract the exclusion clause in question. In the premises, I find that even if the plaintiff had proved his case that the TNI soldiers had taken his excavators, no claim will attach because of the exclusion clause.

[27] I shall now consider whether the cl 9(d) applies to this case. Clause 9(d) excludes liability if the excavators were seized by 'government authorities'. The

argument of the defendant is that the 'TNI soldiers' constitute government authority and therefore the claim cannot attach. 'Government authorities' is not defined in the policy but in my opinion the most sensible meaning is that it only refers to Malaysian Government authorities such as the various enforcement departments of the state government or federal government. The territorial limit of the coverage for the excavators is within the State of Sarawak in the policy and therefore it cannot refer to Indonesian Government authorities such as the TNI.

BREACH OF CONDITIONS

[28] The defendant also argued that the conditions 3, 4, 5 and 13 had been breached by the plaintiff and therefore the claim cannot attach even if the plaintiff proved its case.

[29] Condition 3 stipulates that on the happening of any loss, the insured shall immediately give notice and within 15 days shall deliver a detailed claim in writing. The defendant submitted that there are two stages in this condition; immediate notice and a detailed claim in writing within 15 days. The plaintiff testified that he immediately notified the agent of the defendant. It was not a written notice but the clause does not stipulate that the first notice must be in writing. I have no reason to disbelieve the plaintiff although the agent was not called to testify on his behalf. In respect of the written notice, the defendant was notified on 2 July 2007. The incident of loss occurred on 16 June 2007. 17 June 2007 was a Sunday. Therefore if 15 days were made to run from 18 June 2007, the plaintiff would be out of time to deliver the written claim only on 3 July 2007. However, there is evidence that the written claim was faxed to the defendant on 2 July 2007. The assistant general manager of the defendant admitted during cross-examination that the claim was made within time:

> Q: This letter, was it faxed to your company on 2.7.2007?
>
> A: Yes. The letter says it was faxed, whether we received it, I am not sure.
>
> Q: I put it to you that this claim notification, is an effective notification as it was given by your agent Leading Protection Enterprise Sdn. Bhd to your company. Do you agree?
>
> A: Yes.
>
> Q: Refer to Q24. (Counsel reads). I put it to you that the notice of claim was in fact on 2.7.2007. Do you agree?
>
> A: Yes.

[30] Therefore, there is no merit in the submission that condition 3 had been breached by the plaintiff.

[31] Condition 4 stipulates that the insured shall take all reasonable steps to safeguard the insured equipment from loss or damage. There is no evidence at all from the defendant's witnesses, apart from the fact that the excavators were used in a concession area that is near the border, that the plaintiff did not comply with this condition.

[32] Condition 5 states as follows:

> The Insured shall not incur any expense in making good any loss or damage without the written consent of the Company and shall not negotiate pay settle admit or repudiate any claim with the like consent.

[33] The argument of the defendant is that the plaintiff had negotiated with a purported TNI soldier to reduce the ransom from RM100,000 to RM80,000 on his own accord without the consent of the defendant. The first limb of condition 5 cannot apply as the plaintiff did not incur any expense in making good his loss. However, he testified that he negotiated for reduction of the ransom demand. The second limb quite clearly required the plaintiff to obtain the consent of the defendant before negotiating with any third party. Counsel for plaintiff submitted that since the workers were in the custody of the alleged TNI soldiers, the negotiation was in respect of their release as well. I think that this submission is not supported by evidence. Paragraphs 8, 9 and 10 of plaintiff's witness statement reads as follows:

> (8.) My two (2) operators told me that they were forced to construct a helipad at the army camp the next day and they managed to escape after obtaining permission to ease themselves.
>
> (9.) Following the incident I went to our base camp on 18th June 2007 when the Indonesian soldiers called me again, this time to demand the return of my excavators for RM100,000.00
>
> (10.) I managed to convince them to reduce the demanded sum to a sum of RM80,000.00 and brought the money with me. My condition to the army was to get them to drive my excavators to our border where I will hand them the money.

[34] The workers, Mr Wira and Mr Yap had already escaped when the plaintiff managed to reduce the ransom demand to RM80,000. That meant the negotiation was only in respect of the excavators. The plaintiff did not obtained any consent from the defendant to negotiate for the release of the excavators and he did not keep the defendant in the loop about the progress of the negotiations at all. Therefore, he clearly breached condition 5. I need not discuss condition 13 as it is a general stipulation that all conditions must be

complied.

DAMAGES

[35] For the benefit of the appellate court, I shall now make my views known on the damages that the plaintiff should be awarded in the event it is found that the defendant is liable. The plaintiff has claimed for loss of use of the excavators and for damages for loss of the excavators. He is claiming RM500 a day since 16 June 2007. Loss of use has been excluded in the policy by the plain words in cl 2 of the exception which reads as follows:

> The Company shall not be liable for:
>
> 2. for any consequential loss or legal liability whatsoever:

[36] In *Commercial Union Assurance (M) Sdn Bhd v Pilihan Megah Sdn Bhd* [1998] 7 MLJ 33 which was cited by learned counsel for defendant, Azmel J set aside the award of consequential loss by arbitrator because it had been excluded by the policy and said as follows:

> In this respect, I agree entirely with the submission of counsel for the applicant that the arbitrator had made an error of law concerning the legal meaning of the words 'consequential loss' using it in the context of a contractual or a tortious claim, which is different from the understanding found in the insurance industry. In insurance contract the extent of the risk assumed by the applicant had been pre-determined. In this case, the amount insured was determined at RM2.4m being the original value of the contract to construct the said drains. Therefore the use of the concept of 'forseeability' of loss or loss 'resulting directly and naturally' is wrong and unsustainable in insurance law. This is not a claim for a breach of contract or for a breach of tortious duty. This is a claim for indemnity under the insurance policy. Malcolm A Clarke in his book *Insurance Contracts* (2nd Ed) said:
>
> So, whether an insurance contract covers consequential loss is a matter of the terms of the contract concerned. The insurance industry's notion of consequential loss is quite different from that of the lawyer.

[37] Similarly, the claim for loss of profits in this case is without any merit as insurance policy specifically excluded it.

[38] In respect of the loss of the two excavators, the plaintiff is claiming the purchase price of RM680,000. The insured value is also RM680,000. The plaintiff did not tender any evidence of the market value of the excavators although the burden was on him to prove his loss. Therefore, the plaintiff can only claim the insured value as damages if the insurance policy is a *valued policy* as opposed to an *unvalued policy*. A valued policy is one where the insurers at

the time of the insuring, agree to the value of the property, the valuation being made by an expert, and it is this value that becomes the measure of indemnity if a loss occurs (per Siti Norma J in *Thag Services Inc (M) Sdn Bhd v Capital Insurance Bhd* [1989] 2 CLJ 504). In this case, cl 19 of the Equipment Insurance Schedule provides that in the event of loss, *the limit of the indemnity of the company shall be the insured value or the market value of the insured equipment, whichever is lower*. Therefore, this is an *unvalued* policy. The plaintiff is only entitled to the market value of the excavators at the time of the loss. The burden was on the plaintiff to tender evidence of market value if he thought that the excavators were worth RM680,000 at the time of the alleged loss. He failed to do so. The loss adjustor who was called by the defendant, on the other hand testified that the market value of the two excavators was RM620,000. His evidence was not challenged by the plaintiff. Therefore, in the event I had found for the plaintiff, I would have awarded RM620,000 as damages.

[39] In summary these are my findings. I had found that the plaintiff failed to prove that the excavators were driven at gun point from the Malaysian side of the border into Indonesian territory. Even if I had found the plaintiff succeeded in proving theft, the claim does not attach because of exclusion cl 9(b). I also found, in the event the plaintiff had proved his claim, there was a breach of condition 5 in that the plaintiff failed to obtained the consent of the defendant before negotiating with the alleged TNI soldiers. For all the above reasons, I dismiss the claim of the plaintiff with costs to be taxed unless otherwise agreed.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan